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No. 00-139

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICROSOFT'S REPLY BRIEF

William H. Neukom
Thomas W. Burt
David A. Heiner, Jr.
MICROSOFT CORPORATION

Carter G. Phillips
SIDLEY & AUSTIN

Charles F. Rule
COVINGTON & BURLING

John L. Warden
Counsel of Record
Richard J. Urowsky
Steven L. Holley
Richard C. Pepperman, II
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Appellant
Microsoft Corporation

August 22, 2000

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List of Parties and Rule 29.6 Statement

There have been no changes in the information previously submitted by Microsoft in its jurisdictional statement pursuant to Rule 29.6.

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Appellees portray Microsoft's principled position that appellate review in this case should follow the normal course as an effort to delay resolution of its appeals. (DOJ Br. at 2, 16 n.14.) That accusation is unfounded. No one is more anxious than Microsoft to see this case brought to a prompt conclusion. But the benefits of comprehensive review by the court of appeals far outweigh whatever time, if any, might be saved by direct review in this Court. As Justice Burton cautioned in the Steel Seizure Case, which, unlike this case, presented a true national emergency:

> The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an immediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 937, 938 (1952) (separate opinion of Burton and Frankfurter, J.J.). Contrary to appellees' assertions, nothing about this case justifies a departure from normal appellate practice. The issues raised by these appeals instead deserve "all of the wisdom that our judicial process makes available." *Id.*

1. The Expediting Act Gives This Court Unqualified Discretion To Deny These Direct Appeals. If the district court "enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice," the Expediting Act provides that this Court shall "either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) *in its discretion*, deny the direct appeal and remand the case to the court of appeals." 15 U.S.C. § 29(b) (emphasis added). Even appellees acknowledge that this Court has discretion to deny a direct appeal certified by the district court. (DOJ Br. at 13-14; States Br. at 7.) In fact, appellees expressly advised the district court that "[t]he Expediting Act affords the Supreme Court *broad discretion* to remand an appeal to the court of

appeals if it considers the case inappropriate for its plenary review." (Pls.' Reply in Support of Certification of Direct Appeal at 5 (emphasis added).)

Appellees now contend, however, that this Court's discretion is limited by the "general public importance" standard that guides the district court. (DOJ Br. at 15.) They go so far as to argue that the 1974 amendments gave the courts of appeals jurisdiction over only "routine appeals." (*Id.* at 13.) The plain language of the Act is to the contrary: the "general public importance" standard applies only to the district court's certification decision; this Court's discretion to deny a direct appeal is unqualified.

Nor can appellees find support for their newfound reading of the Act in the legislative history of the 1974 amendments. (DOJ Br. at 14 n.12.) In fact, that history belies appellees' position. Although the House version of the 1974 revisions to the Act made no reference to this Court's discretion, that version was *not* enacted. Appellees refer to a statement in the House Committee Report that the intent was not to give the Court "absolute discretion" to hear a case on direct review, but rather to impose the "general public importance" standard. *See* H.R. REP. NO. 93-1463, at 13-14 (1974). But "the Senate version of the Act's revisions, *in what became the final statutory language*, authorized the Court, 'in its discretion, [to] deny the direct appeal.' As it appears in the statute, the word 'discretion' is unqualified." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 2.7, at 53 n.34 (7th ed. 1993) (emphasis added).

Furthermore, "it is the statute, and not the Committee Report, which is the authoritative expression of law." *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 337 (1994). Here, the statute—which is unambiguous—imposes no limitation whatsoever on this Court's discretion to deny a direct appeal.

2. *AT&T* Was a Very Different Case. Appellees contend that the two appeals of the AT&T consent decree bear "close similarities" to these appeals. (DOJ Br. at 15.) To the

contrary, the issues raised in those appeals were very different from those raised here. As the DOJ stated in urging this Court to accept the direct appeals in *Maryland*:

> The issues raised by appellants are particularly suited to expedited direct review by this Court. The preemptive effect of the federal antitrust decree on state regulatory law, contested in the states' appeals, is purely an issue of law. *Its resolution will not require the Court to examine an evidentiary record, and therefore prior review by the court of appeals is not necessary to facilitate this Court's review.* Similarly, with respect to the private intervenor-appellants' claims that the district court erred in declining to require the modifications they favored, *the Court need not review any complex factual record*. It need only determine whether the district court applied the correct legal standard and acted within its discretion in concluding that the judgment consented to by the parties was in the public interest.

Motion to Affirm at 16, *Maryland* v. *United States*, 460 U.S. 1001 (1983) (Nos. 82-952, 82-953, 82-992 & 82-1001) (emphasis added).

Appellees cannot deny that resolution of Microsoft's appeals will entail a thorough review of a complex factual record. Allowing the court of appeals to conduct that review will aid immeasurably this Court's consideration of the case, and may eliminate the need for this Court ever to intervene. Appellees ask rhetorically what future case would qualify for direct review if this case does not. (DOJ Br. at 18.) The answer is: a case in which the nature of the issues presented and the state of the record make it suitable for direct review by this Court. *AT&T* was such a case; this case is not.

3. The Factual Issues Raised Are Ill-Suited for Direct Review. Appellees' approach to this case is undoubtedly familiar to the Court—they assume that the findings below are unassailable and argue that the case presents only five substantial legal questions. That approach, however, does not

apply here. Because the district court's findings have never been subjected to appellate review, they are not entitled to the deference this Court typically gives findings concurred in by two lower courts under the "two-court rule." *See Berenyi* v. *District Director, INS*, 385 U.S. 630, 636 (1967).

In fact, the findings in this case are not the product of even one level of impartial decision-making. The district court's extensive extrajudicial comments—which appellees understandably make no effort to defend—in combination with (i) its improper decisions regarding the conduct of the trial and (ii) its imposition of draconian relief without holding a hearing, cast serious doubt on the reliability of the district court as finder of fact. Once appellees' false assumption that this case is just like the typical case the Court considers on certiorari is dispelled, the magnitude of the task ahead is clear. Plenary appellate review of the decision below will require a thorough vetting of the district court's findings so that consideration of the many substantial legal questions presented is grounded in reality.[1]

Appellees halfheartedly argue that the record below presents no obstacle to direct review. (DOJ Br. at 25-28.) For example, they attempt in a footnote to defend the district court's failure to cite any record evidence in its lengthy findings. (*Id.* at 27 n.28.) Although a district court is not required to identify the record evidence that supports its findings, *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988), the district court's failure to do so here would add considerably to the Court's burden were it to hear the appeals directly. As the Court once observed:

[1] What is more, appellees have taken liberties with the district court's findings. For example, they imply that Microsoft threatened to terminate the Windows license of any OEM that preinstalled Navigator. (DOJ Br. at 7.) That suggestion is false and unsupported by the cited finding. (Findings ¶ 203 (A140).) Moreover, the district court expressly found that "Microsoft's license agreements have never prohibited OEMs from pre-installing programs, including Navigator, on their PCs and placing icons and entries for those programs on the Windows desktop and in the 'Start' menu." (*Id.* ¶ 217 (A147-48).)

> We have also been hampered by the absence of transcript citations in support of the District Court's findings. It is to be remembered that in a direct-appeal case like this one, we must apply the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52(a), just as the courts of appeals must in cases governed exclusively by 28 U.S.C. §§ 1291 and 1292. We welcome any assistance in performance of that role, as do, undoubtedly, the courts of appeals.

United States v. *Marine Bancorp.*, 418 U.S. 602, 615 n.13 (1974) (citation omitted).[2]

Appellees also unsuccessfully try to refute (DOJ Br. at 28 n.29) the two examples of clear factual error provided by Microsoft (J.S. at 18-19). *First*, they assert that the district court correctly found that Microsoft "largely succeeded in exiling Navigator from the crucial OEM distribution channel." (Findings ¶ 239 (A159).) Yet the two exhibits on which appellees rely, GX 421 and GX 2116, together show that Navigator was being distributed by Compaq, Fujitsu, Gateway, Hewlett Packard, IBM and Sony—six of the world's largest OEMs. Appellees also challenge DX 2440's statement that Navigator was included on "22% of OEM shipments with minimal promotion," arguing that the phrase

[2] Appellees note that "a judge does not commit reversible error in admitting hearsay in a bench trial unless the judge improperly relies on that evidence." (DOJ Br. at 23.) Here, the findings make it impossible to ascertain the extent to which the district court relied on hearsay because there are no citations. A review of the record, however, will reveal that such reliance is highly likely. For instance, the district court itself marked as Court Exhibit 1 (Jan. 6, 1999 a.m. Tr. at 44-45) an op-ed column from the *Washington Post* (David Ignatius, *Knowing When Not To Compete*, WASH. POST, Jan. 6, 1999, at A25). The district court later questioned both sides about a statement attributed to Steve Ballmer, Microsoft's CEO, by *PC Week*. (May 24, 2000 p.m. Tr. at 4, 6, 20.) And in its memorandum accompanying its final judgment, the district court stated that it had concluded that structural relief was appropriate in part because "Microsoft officials have recently been quoted publicly to the effect that the company has 'done nothing wrong.'" (A249.)

"with minimal promotion" means that an icon for Navigator was not pre-configured to appear on the Windows desktop. That reading is inconsistent not only with the language of DX 2440, but also with the testimony of appellees' own economist. Fisher read the phrase "minimal promotion" to mean that Netscape had achieved the stated level of distribution without *paying* OEMs for shipping Navigator. (June 3, 1999 a.m. Tr. at 52.)[3]

Second, appellees argue that the district court correctly found that Microsoft "bound" Internet Explorer to Windows "by placing code specific to Web browsing in the same files as code that provided operating system functions." (Findings ¶ 161 (A122).) According to appellees, Jim Allchin admitted that "Windows 98 contains code used only to browse the Web." (DOJ Br. at 28 n.29.) Allchin testified only that "[i]f you define Web browsing as meaning HTTP [Hyper Text Transfer Protocol], then there is some code specifically that deals with HTTP." (Feb. 2, 1999 a.m. Tr. at 65.) He said nothing, however, to support the finding that Microsoft "mixed" code specific to Web browsing with code specific to operating system functions in the same files. Alchin also testified that Windows 98 contains "an incredible amount of code that's shared" between Web browsing and other operating system functions (*id.* at 66), thus refuting appellees' assertion that Windows 98 contains a standalone Web browser that can be neatly excised from the operating system.[4]

In any event, a finding of fact is "clearly erroneous" under Rule 52(a) "when although there is evidence to support it, the reviewing court on the *entire evidence* is left with the

[3] GX 2116 also shows that to the extent a Navigator icon was not included on the Windows desktop, Navigator was included in the Windows "Start" menu—the primary means of accessing programs—and thus was readily accessible to users.

[4] In fact, counsel for Netscape advised the DOJ in March 1998 that "it simply is not possible to delete any portion of IE, or of browser functionality, from Windows 98 as presently configured without severely interfering with the operating system." (DX 35 at ATR-10980.)

definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). This Court should leave to the court of appeals the onerous task of reviewing the "entire evidence" to identify the many factual errors made by the district court. Although this Court is obviously fully capable of reviewing the record for such errors, it would plainly benefit from initial review by the court of appeals. *See* Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 599 (1972) ("Even when the record is adequate, direct appeal means that the Supreme Court does not have the benefit of the preliminary screening and sharpening of issues that the courts of appeals ordinarily provide."). There is no reason for this Court to forgo those benefits in order to hear Microsoft's appeals now.[5]

4. The Legal Issues Raised Are Ill-Suited for Direct Review. Appellees suggest that the list of legal issues set out by Microsoft (J.S. at 21-23) was concocted by "[i]maginative appellate counsel" in an effort to overstate the complexity of this case. (DOJ Br. at 19 n.17.) To the contrary, that list reflects the efforts of Microsoft's counsel to identify "questions that are worthy of the appellate court's consideration." (*Id.*) What appellees fail to recognize is that appeals in antitrust cases of this magnitude inevitably involve myriad complicated issues. For this reason, the defendants' briefs in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), were

[5] Appellees assert that this Court has not been "daunted by large antitrust records in exercising its certiorari jurisdiction." (DOJ Br. at 26.) In cases like *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (DOJ Br. at 26 n.25), however, the Court had the benefit of prior review by the court of appeals and limited its grant of certiorari to a few discrete legal questions. In fact, the Court expressly stated in *Matsushita* that it had reviewed "only the standard applied by the Court of Appeals in deciding th[e] case, and not the weight assigned to particular pieces of evidence." 475 U.S. at 577.

211 and 189 pages long, respectively, and the Court required more than one Term to decide those cases. (J.S. at 27 & n.5.)

Appellees seek to minimize the complexity of the legal issues raised here by downplaying some and ignoring others. For example, in their statement of the case, appellees relegate the discussion of their tying claim—the linchpin of their complaints—to a footnote (DOJ Br. at 11 n.9), and they elsewhere characterize that claim as "another matter that is not necessary to support the prescribed relief" (*id.* at 22). Appellees' effort to deflect attention from the cornerstone of their monopolization case speaks volumes about the flaws in the district court's judgment.

On the clearest procedural errors below, appellees are conspicuously silent. They state that the district court's entry of final judgment without a hearing on relief "should not detain the Court." (DOJ Br. at 25 n.23.) It is undoubtedly true that this issue can be resolved quickly—not because it is frivolous, but because the district court's refusal to afford Microsoft an opportunity to present evidence and its total reliance on inadmissible hearsay in fashioning relief was patently improper. Appellees contend that the trial itself "provided an adequate basis for determining the scope of relief." (*Id.*) But it is impossible to reconcile that contention with appellees' decision to file six lengthy declarations in support of their proposed final judgment. Plainly, appellees themselves did not regard the trial record as sufficient.

Appellees do not even attempt to defend the district court's extrajudicial statements to the press. They instead argue that those statements do not provide an independent basis for reversal. (DOJ Br. at 20 n.18.) Assuming, *arguendo*, that were so, appellees overlook the additional question of whether the district court's improper dealings with the press require disqualification under 28 U.S.C. § 455 in the event this case is remanded. The final judgment, by its terms, contemplates future proceedings in the district court if the judgment is affirmed. (A254-57, A271.) The court of appeals should have an opportunity to decide the disqualification

question in the exercise of its supervisory authority over the district court. *In re IBM*, 45 F.3d 641, 642-43 (2d Cir. 1995) (referring to "newspaper interviews given by the Judge concerning IBM's activities" as one basis for recusal).

5. Appellees' Other Arguments Are Unavailing. Appellees argue that expedition is justified because the district court "stayed its judgment pending appeal." (DOJ Br. at 18.) They contend that "[n]o firm in the affected industries can confidently plan or commit resources until it knows whether or when the final judgment will take effect." (*Id.*) As an initial matter, appellees' claim of paralysis in the high-technology sector is wildly exaggerated, as evidenced by the continuing flow of capital into that sector and the countless new product introductions. More fundamentally, the district court would not have stayed its judgment had it believed—as appellees contend—that immediate relief was necessary to prevent serious harm to the Nation's economy.[6]

Relying on *IBM* v. *United States*, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974), appellees also argue that allowing the court of appeals to review this case would contravene the Expediting Act's prohibition of "piecemeal appeals." (DOJ Br. at 29.) The "piecemeal appeals" referred to in *IBM*, however, were interlocutory appeals taken prior to entry of final judgment. 480 F.2d at 295-96. In this case, final judgment has been entered.

At bottom, appellees imply that because the DOJ[7] has not routinely sought direct review under the Expediting Act, it is

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[6] In the *AT&T* appeals, the district court cited the *absence* of a stay and the imminence of the agreed divestiture as a reason for certifying the case for direct appeal. *United States* v. *Western Elec. Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,596, at 68,972 (D.D.C. Sept. 7, 1983); *United States* v. *Western Elec. Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,130, at 71,311 (D.D.C. Nov. 10, 1982).

[7] Appellees contend that the States are "parties to the proceeding" under Rule 18.2. (States Br. at 11-12; DOJ Br. at 29 n.30.) But Rule 18.2 does not confer jurisdiction where it does not otherwise exist; it assumes the existence of such jurisdiction. The Expediting Act does not confer

entitled to deference when it makes such a request. (DOJ Br. at 15.) Of course, the DOJ had little choice but to seek certification after the district court expressly requested it to do so. (April 4, 2000 Tr. at 11.) More importantly, the Expediting Act confers no special right on the DOJ to seek direct review. Rather, *either* party can make such an application, and the fact that the DOJ has done so here (but not in other cases) says nothing about the suitability of this case for direct review. The Court should exercise its discretion to deny these direct appeals and remand the case to the court of appeals.[8]

Respectfully submitted,

William H. Neukom
Thomas W. Burt
David A. Heiner, Jr.
MICROSOFT CORPORATION

Carter G. Phillips
SIDLEY & AUSTIN

Charles F. Rule
COVINGTON & BURLING

John L. Warden
Counsel of Record
Richard J. Urowsky
Steven L. Holley
Richard C. Pepperman, II
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

August 22, 2000

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jurisdiction on the Court to hear Microsoft's appeal in the States' separately filed action. (J.S. at 27-28.)

[8] The amicus briefs merit little response. Their scurrilous accusations based entirely on press clippings and other hearsay are emblematic of the sensational manner in which this case was tried. That said, the reversal of position by Judge Bork, counsel of record for one of the amici supporting appellees, warrants mention. Two months ago, Judge Bork was quoted as referring to appellees' effort to secure direct review in this Court as "a futile gesture," stating, "I don't quite see the national emergency." Howard Mintz, *Microsoft Appeals Process Could Drag on for Years*, SAN JOSE MERCURY NEWS, June 8, 2000, at A1. He also was quoted as saying, "I don't know why this case should be treated like it's some kind of an earthquake . . . . I kind of doubt that the Supreme Court would grant it." *Fate of Microsoft May Hinge on Appeals Court*, SEATTLE TIMES, June 8, 2000, at A1. Judge Bork's initial reaction was correct, and he offers no explanation for his change of view.

OPINION

SUPREME COURT OF THE UNITED STATES

MICROSOFT CORPORATION

00–139 *v.*

UNITED STATES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NEW YORK, EX REL. ELIOT SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL.

00–261 *v.*

MICROSOFT CORPORATION

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00–139 and 00–261. Decided September 26, 2000

In No. 00–139, the direct appeal is denied, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit. The Clerk is directed to issue the judgment forthwith.

In No. 00–261, the petition for a writ of certiorari before judgment is denied.

JUSTICE BREYER, dissenting in No. 00–139.

I would note probable jurisdiction in this case. 15 U. S. C. §29(b). The case significantly affects an important sector of the economy—a sector characterized by rapid technological change. Speed in reaching a final decision may help create legal certainty. That certainty, in turn, may further the economic development of that sector so important to our Nation's prosperity.

I recognize that there are competing considerations. A court of appeals proceeding would likely narrow, focus, and initially decide the legal issues now presented here. It

would thereby facilitate any later deliberation in this Court. Nonetheless, I believe this Court can consider the issues fully now by taking additional briefs and by granting additional time for oral argument, if necessary. Consequently, I would hear the appeal.

STATEMENT OF CHIEF JUSTICE REHNQUIST.

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm, and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

28 U. S. C. §455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific instances in which disqualification is required, including those instances where the child of a Justice "[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding." 28 U. S. C. §455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's non-pecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those

interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with §455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under §455(a) "is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U. S. 540, 548 (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. *See ibid.*; *In re Drexel Burnham Lambert, Inc.*, 861 F. 2d 1307, 1309 (CA2 1988). I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters. Therefore I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son's representation and the matters before this Court relate to Microsoft's potential antitrust liability. A decision by this Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts. But, by virtue of this Court's position atop the federal judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to §455(a) seems contrary to the "reasonable per-